

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Haviland Telephone Co., Inc.,)	File Number EB-02-KC-331
)	
Owner of Antenna Structure Registration)	NAL/Acct. No. 200232560009
No. 1033509)	
)	
Haviland, Kansas)	FRN 0005-0815-67

FORFEITURE ORDER

Adopted: January 31, 2003

Released: February 4, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of two thousand five hundred dollars (\$2,500) to Haviland Telephone Co., Inc., (“Haviland”) for willful violation of Section 17.21 of the Commission’s Rules (“*Rules*”).¹ The noted violation involves Haviland’s failure to exhibit the prescribed painting.

2. On June 13, 2002, the Commission’s Kansas City, Kansas Field Office (“Kansas City Office”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) in the amount of ten thousand dollars (\$10,000) to Haviland for the noted violation.² Haviland filed a response to the *NAL* on July 22, 2002, and filed a supplement to its response dated August 20, 2002.

II. BACKGROUND

3. On May 16, 2002, an agent from the Kansas City Office inspected Haviland’s antenna structure number 1033509 in Haviland, Kansas. The structure’s height was 122 meters (400 feet), thus requiring painting and lighting. The agent observed that the antenna structure was unpainted, there were no daytime obstruction lights in operation, and that there was no antenna structure registration (“*ASR*”) number visible at or near the base of the tower. The *ASR* and the Federal Aviation Administration (“*FAA*”) records for this structure both prescribe that red obstruction lighting and paint be exhibited on the structure.

4. On June 13, 2002, the Kansas City Office issued an *NAL* in the amount of \$10,000 to Haviland for failure to exhibit the prescribed painting in willful violation of Section 17.21 of the Rules. In its response to the *NAL*, Haviland requests that the proposed forfeiture be remitted or substantially reduced. Haviland states that the *NAL* mistakenly asserts that the daytime obstruction lights were not in

¹ 47 C.F.R. § 17.21.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232560009 (Enf. Bur., Kansas City Office, released June 13, 2002).

operation on May 16, 2002. Specifically, Haviland claims that it received a telephone call from the Kansas City Office on May 16, 2002, and that it visually inspected the tower while the caller was on the telephone. At this time, argues Haviland, the tower's lighting system was operating properly. In addition, Haviland states that when the tower was constructed in 1993, Haviland proceeded with the "good faith belief" that medium intensity strobe lighting was an equivalent to painting and red obstruction lighting. Moreover, Haviland indicates that the FAA clearance in Aeronautical Study No. 93-ACE-0022-OE stated that the structure was to be marked and lighted "in accordance with FAA Advisory Circular 70/7460-1H ("FAA Circular")." Haviland argues that paragraphs 37(b) and 42(b) of the FAA Circular state that when medium-intensity flashing white (strobe) obstruction lighting systems are used on structures of 500 feet or less in height, other methods of marking and lighting the structure may be omitted. Haviland contends that its decision not to paint the tower and to substitute white strobe lighting for red obstruction lighting was made with its belief at the time that this change was permitted without any further regulatory involvement. Moreover, Haviland contends that its change to white strobe lighting was not done surreptitiously with any intent to deceive the regulatory agencies or gain some undue advantage. In fact, argues Haviland, in its notification to the FAA in May 1993 of construction of its tower, Haviland indicated that its structure would be lit with white lighting. Haviland states that it believed at the time that this was all it was required to do. Haviland adds that its change did not result in a compromise in aeronautical safety. Haviland states that it has now learned that while medium intensity white strobe lighting may be substituted for painting and red obstruction lighting, this substitution requires prior coordination with the FAA and the FCC. Haviland argues that following receipt of the *NAL*, it referred the matter to its counsel when it first learned of the requirement of coordination with the FAA and FCC prior to making such a change. Haviland states that its counsel promptly submitted a formal request to the FAA for authorization to utilize white strobe lighting in lieu of painting and red obstruction lighting.

5. Next, Haviland argues that Section 17.17(a) of the Rules implies a grandfathering of tower marking and lighting as it existed prior to July 1, 1996. According to Haviland, under this interpretation of Section 17.17(a), it may retain its existing white strobe lighting without penalty since neither the overall structure height nor the site coordinates have changed since the tower was built, consistent with the apparent wording of the Rule. Haviland also argues that all of the downward adjustment criteria apply, and consequently, a reduction in the forfeiture amount is warranted.³ Based on its statement of facts, contends Haviland, the only violation in this case is its failure in 1993 to file the required forms with the FAA and FCC to coordinate the change from painting and red obstruction lighting to medium intensity white strobe lighting. Thus, Haviland states that this is the only offense for which a forfeiture should be considered. With respect to the finding in the *NAL* that there was no ASR number visible at or near the base of the tower, Haviland states that the placard which had been secured to the tower apparently blew away in a storm several days before the inspection. Haviland indicates that it subsequently secured a new placard to the tower.⁴ In its supplement to the response to the *NAL*, Haviland reports that the FAA issued the formal clearance on July, 17, 2002, for Haviland to utilize white strobe lighting instead of painting and red obstruction lighting. Haviland also states that its corresponding application for modification of its tower's ASR was filed with the Commission on August 16, 2002, and was granted on the same day. Haviland requests that the Commission take into consideration its immediate actions once it became aware of the "regulatory irregularity."

III. DISCUSSION

³ See note to 47 C.F.R. § 1.80(b)(4) (The downward adjustment criteria are: minor violation, good faith or voluntary disclosure, history of overall compliance, and inability to pay).

⁴ We note that no forfeiture was assessed for this violation. Accordingly, we see no need to further address this matter herein.

6. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended, (“Act”)⁵ Section 1.80 of the Rules,⁶ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999). In examining Haviland’s response, and supplement thereto, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁷

7. We agree that the forfeiture amount should be reduced. We note, however, that Haviland failed to paint its tower as prescribed by the ASR and FAA records on file for its tower at the time of the inspection. We therefore find that Haviland violated Section 17.21 of the Rules. We note also that after filing the appropriate FCC and FAA forms, the licensee received the necessary approval to utilize the medium intensity white strobe lighting in lieu of the required painting and red obstruction lighting. Given the facts of this case, specifically Haviland’s belief that the medium intensity white strobe lighting was an acceptable alternative and the pro forma nature of the approval of the alternative lighting, we conclude that the licensee’s failure to paint the tower was a minor violation of Section 17.21 of the Rules.⁸ We conclude also that the violation resulted more from the licensee’s failure to file the required FCC and FAA forms. We will therefore reduce the forfeiture amount to \$3,000, which is consistent with the forfeiture amount for failure to file required forms or information. However, with respect to Haviland’s assertion that the forfeiture should be reduced on the basis of its inability to pay, it does not submit any financial documentation from which we can assess its ability to pay. Thus, we decline to reduce the forfeiture amount on this basis. Finally, Haviland requests that we consider its history of overall compliance. We will do so, and further reduce the forfeiture amount to \$2,500.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,⁹ Haviland IS LIABLE FOR A MONETARY FORFEITURE in the amount of two thousand five hundred dollars (\$2,500) for failure to exhibit the prescribed painting on its antenna structure in willful violation of Section 17.21 of the Rules.

9. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁰ Payment shall be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note NAL/Acct. No. 200232560009 and FRN 0005-0815-67. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹¹

10. IT IS FURTHER ORDERED that, a copy of this *Order* shall be sent by Certified Mail,

⁵ 47 U.S.C. § 503(b)(2)(D).

⁶ 47 C.F.R. § 1.80.

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ In light of our decision, we need not reach Haviland’s arguments regarding Section 17.17(a).

⁹ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁰ 47 U.S.C. § 504(a).

¹¹ See 47 C.F.R. § 1.1914.

Return Receipt Requested, to Haviland Telephone Co., Inc., P.O. Box 308, Haviland, Kansas 67059-0308, and to its counsel, Harold Mordkofsky, Esq., Blooston, Mordkofsky, Dickens, Duffy & Prendergast, 2120 L Street, N.W., Washington, DC 20037.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau